

Federal Communications Commission
Washington, D.C. 20554

In reply refer to:
1800B3-MFW

July 10, 1998

Released: July 20, 1998

Mr. Hippolito Cuevas
P.O. Box 7508
New Haven, Connecticut 06512

In re: Unlicensed FM station, New Haven, Connecticut
La Nueva Radio Musical
Request for waiver of FCC rules limiting low
power FM service

Dear Mr. Cuevas:

Your petition to Chairman William F. Kennard, dated April 14, 1998, has been referred to me for response. In that correspondence, and on behalf of the Hispanic community of New Haven, Connecticut, you request waiver of the Commission's regulations to permit "La Nueva Radio Musical" to operate an unlicensed FM station transmitting on 104.5 MHz in New Haven. In support of the waiver request, you state that: (1) La Nueva Radio Musical provides news, information, entertainment, local announcements, and public service announcements to the New Haven Hispanic community; (2) La Nueva Radio Musical's operation with a power of less than 100 watts will not cause interference to any other broadcast stations; and (3) La Nueva Radio Musical's operation is consistent with Chairman Kennard's statements regarding low power FM radios stations. In the event that the waiver request is denied, you also request that the Commission stay any enforcement action against "La Nueva Radio Musical" pending resolution of *United States of America v. Dunifer*, 997 F. Supp 1235 (N.D. Cal. 1998) ("*U.S. v. Dunifer*"). For the reasons set forth below, we will dismiss the waiver request and deny the request for stay.

In the absence of an application for a license, your request amounts to a request for approval of an unlicensed broadcasting operation. Section 301 of the Communications Act, however, requires a license in order to broadcast and the Commission has no authority to waive that statutory requirement. 47 U.S.C. § 301. The Commission does have authority to waive its rules limiting low power FM service that, absent a waiver, would preclude the grant of an application for a low power FM broadcast station. 47 C.F.R. § 1.3. But the Commission will not consider a request for a waiver of the rules except in the context of a "written" application for a license with the information required by Section 308 of the Communications Act, 47 U.S.C. § 308, and the Commission's implementing regulations, together with a request for waiver of the

relevant rules, 47 C.F.R. § 73.3566. Nor will the Commission consider a challenge to the validity of the rules except in the context of a petition for rulemaking to change the rules, 47 C.F.R. § 1.401. See *U.S. v. Dunifer, supra*, (permanent injunction granted against unlicensed FM radio station in Berkeley, California); and *Stephen Paul Dunifer*, 11 FCC Rcd 718, ¶¶ 8-9 (1995). A "slip opinion" copy of the District Court's decision in *U.S. v. Dunifer* is enclosed. Accordingly, the waiver request will be dismissed.

You also request that the Commission allow La Nueva Radio Musical to continue to operate its unlicensed station "until such time as the pending court cases regarding [low power FM radio] are resolved, a new LPFM service is established, and the courts have reviewed the FCC authority in such matters." We note that, on June 16, 1998, the United States District Court for the Northern District of California issued its decision in *U.S. v. Dunifer*, granting the government's motion for summary judgment and permanently enjoining Dunifer and "all persons in active participation with him" from (1) making radio transmissions within the United States unless and until they first obtain a license from the FCC, and (2) doing any act, whether direct or indirect, to cause unlicensed radio transmissions or to enable such radio transmissions to occur. *U.S. v. Dunifer, supra*, 997 F. Supp at 1244. This decision undercuts the primary basis for the request for deferral of enforcement action.

Moreover, even should the District Court's decision be appealed to the United States Court of Appeals for the Ninth Circuit, you have not established sufficient grounds warranting a stay of any enforcement action by the government against La Nueva Radio Musical. See *WIYN Radio, Inc.*, 59 FCC 2d 424, ¶ 4 (1976). First, you cannot show that La Nueva Radio Musical is likely to prevail on the merits in any enforcement action brought against it because La Nueva Radio Musical is violating Section 301 by broadcasting without a license. 47 U.S.C. § 301; see *U.S. v. Dunifer*; *WIYN Radio, Inc.*, 59 FCC 2d at 425, ¶ 4. Second, there is no irreparable injury here to a legally protected interest because La Nueva Radio Musical has no right to broadcast without a license. 47 U.S.C. § 301; see *NBC v. United States*, 319 U.S. 190, 227 (1943) ("The right of free speech does not include . . . the right to use the facilities of radio *without a license*." (emphasis added); *U.S. v. Dunifer*. Third, issuance of a stay may harm other parties, specifically licensed broadcasters who may receive interference as a result of La Nueva Radio Musical's unlicensed operation. See *Stephen Paul Dunifer*, 11 FCC Rcd at 724, ¶ 14. Finally, the public interest is not served by unlicensed broadcasting in violation of Section 301. See *id.* at 722-28, ¶¶ 12-24. Accordingly, your request for stay of action will be denied.

In light of the foregoing, the instant request for waiver on behalf of La Nueva Radio Musical IS HEREBY DISMISSED, and the request for stay of enforcement action IS HEREBY DENIED.

We underscore that La Nueva Radio Musical has no authority to operate an FM radio station. Any operation occurring prior to or during the pendency of this waiver request was unauthorized. A copy of this letter is being forwarded to the Commission's Compliance and Information Bureau for whatever action it deems necessary in this matter.